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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

COMMENTS OF SAGA COMMUNICATIONS, INC.

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SUMMARY

There is a national conflict between those anxious to maximize profits by minimizing expenses versus creating public service programming. In the case of television licensees this conflict means that the production of programming to meet local needs must be sacrificed wherever possible if maximizing profits is to be achieved.

Where a television licensee has the use of two or more stations in the same market, that license becomes *per se* dominant in acquiring the lion's share of regional and national advertising revenue. Such a licensee has little or no market incentive to produce any programming, other than some local news. Presently, television licensees have used LMA arrangements to achieve such market dominance in the below 100 markets.

The FCC, through a series of decisions, abandoned its former rules requiring licensees to produce local programming from their main studios. Instead, the FCC relied on "market incentives" and "renewal expectancy." As soon as a television licensee achieves market dominance by means of a non-attributable LMA it loses "market incentive" to produce local programming. Moreover, since its license renewal application cannot be the subject of a comparative renewal hearing, pursuant to the *1996 Telecommunications Act,* the licensee need not concern itself about achieving renewal expectancy.

The only way to require licensees to have "market incentives" to create local programming is through competition. Competition is either greatly reduced or destroyed where a single licensee can directly control two stations in a market or indirectly do so by

means of an LMA arrangement. The present television multiple ownership rules should be maintained to promote diversification, and LMA arrangements should be prohibited.

Finally, there is no evidence of abuse of the single majority stockholder rules there simply is no reason to change this rule.

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COMMENTS OF SAGA COMMUNICATIONS, INC.

Saga Communications, Inc. ("Saga")[1], by its attorneys, hereby respectfully submits its comments in the above-captioned proceeding. In regard thereto it is stated as follows:

I. PRELIMINARY STATEMENT

There are three separate Notices of Proposed Rule Making ("NPRM") released on November 7, 1996, contemplating a major review and possible revision of the FCC's rules designed to foster diversity of viewpoint in television programming. Each of the three related NPRM's are not only quite lengthy[2], but also within each the FCC has

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1 Saga is the parent corporation of the licensee of KOAM-TV, Pittsburg, Kansas. Saga, either directly, or through subsidiaries, is the licensee of 26 radio stations and brokers time on six more radio stations.

2 In addition to the captioned NPRM, the Commission issued a *Further Notice of Proposed Rule Making* in its review of the Commission's regulations and policies (a) governing attribution of broadcast and cable/MDS interests (MM Docket 94-150); (b) affecting investment in the

raised a vast multitude of issues on which it seeks comment. As some of the proceedings were initiated 10 years ago, these consolidated proceedings are a laudable attempt by the Commission to craft a new television paradigm for the 1990's and beyond.

Saga believes the instant proceeding is the most significant of the three NPRM's because it goes to the very heart of the time-honored notions of the benefits of diversity of media voices. What interests are to be attributed in considering the issue of diversification are the key to diversity of viewpoint. Monopoly of media and a monopoly of advertising revenue in the same market may be compared to two sides of the same gold coin. While monopoly of local media may help an entrepreneur to enhance its private interest by obtaining the lion's share of market revenue, it is equally obvious that it is contrary to the public interest. For decades in conducting hearings related to issues specified under Section 307(b) of the Communications Act,[3] the Commission always sought to determine whether there existed at least five different competing services to the public in the community under examination. While there are 10,276 commercial AM and

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broadcast industry (MM Docket 92-51); and (c) reexamination of the cross interest policy (MM Docket 87-154); and a *Notice of Proposed Rule Making* examining (a) broadcast television national ownership rules (MM Docket 96-222); (b)regulations covering television broadcasts (MM Docket 91-221), and (c) television satellite stations (MM Docket 87-8). The three NPRM's combined consist of 114 pages.

[3] Title 47 U.S.C. § 307(b).

FM facilities, there are only 1,190 commercial UHF and VHF television stations[4]. It is on these 1,190 stations that the public primarily relies for coverage of local news.

It is axiomatic that the smaller the market, the fewer will be the number of television stations therein[5]. There is an often stated maxim of antitrust law that one does not distinguish between "good" monopolists and "bad" monopolists in applying antitrust policy[6]. In this regard a "good" monopolist is no more in the public interest than a "benevolent despot". Both the monopolist and the despot have a vested interest in assuring that the viewpoint on controversial issues that is presented to the public is the viewpoint the monopolist favors because it is in that person's political or economic best interest. That the viewpoint may also be in the public interest would be shear coincidence. In a democracy it is the public that must determine what is the ultimate good and the public can only do this when presented with contrasting viewpoints. Saga shows herein that *television* time broker ("TBA") or local marketing agreements ("LMA") are not in the public interest for a variety of reasons. In this proceeding, the Commission should take the opportunity to declare such arrangements invalid, and to require existing arrangements to be terminated.

II. TELEVISION LMA ARRANGEMENTS ARE NOT IN THE PUBLIC INTEREST

(A) In the Case Of Television Stations a Local Marketing Agreement Is Not Equivalent to a Radio Time Brokerage Agreement.

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4 *Broadcast Station Totals as of December 31, 1996*, FCC Report No. 71831, released January 21, 1997.

5 E.g., New York City (Market No. 1) has 7 allotted channels; Austin, Texas (Market No. 65) has 6 and Dothan, Alabama (Market No. 173) has 4.

6 *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 213-14 (1940).

When first faced with a case in which a licensee of a radio station "leased" its station to a non-licensee, the FCC found such an arrangement to be per se contrary to the public interest - See, *Regents of Georgia v. Carroll*, 338 U.S. 586 (1950) ("Regents"). Over the passage of time, the FCC's policy evolved from one which initially permitted the brokering of a small portion of the licensee's potential 168 hour broadcast week to the brokering of all, or all but a few hours, of this 168 hour week.

Initially, the FCC expressed its concern that an extensive amount of time brokering might constitute an improper delegation of program control to the time broker[7]. With the proliferation of new aural services, and concerned with the need to provide outlets to address the needs of minorities, the FCC revisited the issue in *Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming*, 82 FCC 2d 107 (1980) ("Part Time Programming"). What the FCC considered in *Part Time Programming* was precisely that; *i.e.*, the licensee sold a part of its program day to others for resale pursuant to a time brokerage agreement ("TBA"), and the licensee originated the balance of the programming. This served two public interest purposes. First, it provided outlets for specialized and foreign language programming to meet needs of minorities. Indeed, it positively served the goal of diversification - "[T]he Commission believes that time brokerage has the potential to noticeably increase available program alternatives"[8]. Second, "[I]t could be expected to broaden employment opportunities and entrepreneurial

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7 *Order Concerning the Filing of Agreements Involving the Sale of Broadcast Time for Resale*, 33 FCC 2d 654 (1972).

8 *Part Time Programming* at 108.

experience for minority groups"[9]. The FCC noted that: The typical licensee using brokered programming has arrangements with several independent producers..."[10]. The FCC noted that one television station brokered "almost a third of its schedule"[11].

By 1990, the concept of a TBA evolved into the LMA. In *Roy R. Russo*, 5 FCC Rcd 7586 (Chief, M.M.B. 1990) ("*Russo*") a single broker purchased the time from 4 a.m. to midnight seven days a week (140 hours out of the 168 hour week). In *Russo* the FCC changed the focus of its scrutiny from addressing increased diversity through use of multiple brokers, each using only part of the station's broadcast week, to reviewing whether the licensee retained the power to control that which was broadcast by being able to reject any particular program or preempt it. No duty of the licensee to actually provide any programming originated by the licensee during this 168 hour week was required so long as the licensee had the *power* to do so. Since active program origination is more expensive that exercising the passive ability to control station operation, the licensee under an LMA has no economic incentive to produce and broadcast programming to meet local needs.

In *Revision of Programming and Commercialization Policies; Ascertainment Requirements and Program Log Requirements for Commercial Television Stations,* 98 FCC 2d 1076 (1984) (*Revision of Programming*), the Commission eliminated programming guidelines finding that: "market incentives will ensure the presentation of programming that responds to community needs and provides sufficient incentives for

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9 Id.

10 Id.

11 Id at 111.

licensees to become and remain aware of the needs and problems of their communities." To fill this void created by abolishing specific programming requirements, the FCC established the vehicle of the "issues/programs" list. This vehicle was to be the foundation without which the licensee could not claim "renewal expectancy" in the case of a comparative renewal hearing. Thus, nowhere in the *Communications Act* of 1934, as amended (the "Act") did the FCC find any power to require a licensee to present any particular programs[12], but relied instead on market forces and the fear of a loss of the so-called "renewal expectancy" as the impetus for a licensee to provide programming to meet local needs.

In *Jones Eastern of the Outer Banks, Inc.*[13], the Commission considered the obligation of an AM, FM or TV licensee to maintain a main studio (See 47 C.F.R. ¶ 73.1125). The Commission held that, at a minimum, this meant one full time managerial and one full time staff person must be employed by the licensee. Nothing in either *Part Time Programming* or *Russo* excuses a licensee from complying with the main studio rule, although neither decision obligates the licensee to use this minimum two person staff to originate one second of programming[14].

In the case of either an AM or FM station, a two person experienced staff of the licensee is certainly capable of originating some programming. However, in the case of a

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12 Cf. 47 U.S.C. § 326.

13 6 FCC Rcd 3615 (1991), clarified 7 FCC Rcd 6800 (1992), aff'd 10 FCC Rcd 3759 (1995).

14 Indeed, the former rule (Section 73.1130) requiring licensees to originate a majority of their programming from their main studios has been eliminated.

television station, a large number of people, from directors to announcers to cameramen to engineers are required to present the simplest of locally-produced programs.

Thus, what has been tacitly permitted by the Commission following *Russo* is the diminution of licensee responsibility to originate local programming to licensee responsibility to merely control the programming that the broker (who has no such local programming obligation), presents on the station. This is a far cry from the fundamental duty of a broadcaster to ascertain and meet the needs of its listening and viewing public. The FCC would not permit a television network to have even a portion of the control over a television licensee that the Commission permits a multiple owner to have with an LMA arrangement. (See, 47 C.F.R. § 73.658).

(B) <u>A Television Licensee's Obligation to Provide Children's Programming is a Personal Obligation of the Licensee and Cannot Be Delegated to a Time Broker</u>

47 U.S.C. ¶ 303(a) and 47 C.F.R. ¶ 73.671 require a television licensee to originate educational and informational programming for children. The obligation is a personal one running to the licensee. Nothing in the *Act* or Section 73.671 of the Rules permits a licensee to delegate this obligation pursuant to an LMA. Thus, a television licensee has a far greater statutory obligation to meet local needs through program origination than does an AM or FM licensee.

At Par. 31 of this NPRM the FCC states: "Since television LMA's are not now attributable, they are not required to be filed with the Commission, and we consequently have little information about their terms and characteristics." Each situation listed in the attached article from *Broadcasting & Cable Magazine*[15] involved two jointly operated television stations in the same market. Were television LMA's attributable interests, as are AM and FM LMA's, these LMA agreements would be in violation of the multiple ownership rules. Since the FCC has no copies of these LMA agreements on file for review by its staff or by the general public, the FCC has no way of knowing whether the licensee has abdicated its personal obligation to originate children's programming or programming designed to meet the needs of its viewing audience. While an AM or FM licensee with only a two person staff can still originate programming and has no obligation to create childrens programming, neither is true in the case of a television licensee.

(C) Television LMA's Are an Anathema to the Creation of Programming to Meet Local Needs and Interests

A television licensee must eventually operate not less than 28 hours per calendar week or lose its license. 47 C.F.R. § 73.1740. The entire rationale behind the adoption of *Revision of Programming* was that market incentives and potential loss of renewal expectancy would motivate the licensee to present programming to meet local needs and interests. Where a television licensee agrees to sell all or most of its broadcast time to a broker, the licensee is not driven by market incentives to do anything more than sit back and collect LMA payments. The licensee under the *Russo* policy must control the station to prevent broadcasting of obscene material, lotteries, etc., but has no legal obligation to actually originate programming.

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15 *Broadcasting & Cable*, January 27, 1997, p.5.

As a result of *Revision of Programming* there is no rule that requires program origination, but rather merely an obligation to maintain an "issues/programs" list. A licensee can maintain such a list even if it shows the licensee did nothing. Only educational programming is required by the *Act*. The *1996 Telecommunications Act* eliminated comparative renewal hearings so the concept of "renewal expectancy" is no longer a relevant factor. Since presentation of local programming is neither required by the amended *Act* nor by an FCC rule, a renewal application cannot be denied pursuant to 47 U.S.C. § 309(k)(1)(B) for failure to broadcast local programming. Since sale of the station's time under an LMA arrangement is not contrary to the public interest, pursuant to *Russo* a renewal application cannot be denied pursuant to 47 U.S.C. § 309(k)(i)(A) as contrary to the public interest. Thus, the combination of the renewal procedures provisions of the *1996 Act* and the *Russo* doctrine have eliminated any legal incentive for a licensee to meet local needs by creating one minute of programming.

(D) LMA's Promote the Creation of a Sham

It is impossible for the FCC to fulfill its mandate under Section 301 of the *Act* (47 U.S.C. § 301) to regulate broadcasting if the FCC permits the existence of a sham. The FCC found, through bitter experience in considering limited partnership applications in comparative broadcast proceedings, that unscrupulous parties will abuse FCC process for personal gain through the vehicle of a sham arrangement. There is no incentive in the case of AM or FM licensees to create a sham as to whom really is in control because an LMA agreement in a duopoly situation is counted as part of the number of stations a single AM or FM licensee may have in the same market. Since over the long term, it is normally cheaper to buy than to lease, the incentive is to buy rather than enter into an stockholder in the corporation"[18]. There is no reason why this is not still true. Unlike sham limited partnership arrangements, counsel is aware of no instances in which the FCC has found that a single majority stockholder situation was a sham. It is obvious that it is always in the best interest of the single majority stockholder to be in ultimate control of the day to day operation of the business. There is no evidence of regulatory problems stemming from the rule, and there is no factual basis for changing this rule. Changing the rule would impose additional unnecessary reporting and due diligence burdens on licensees that are publicly traded or that have multiple stockholders who exercise no control over the licensee. In short, "if it ain't broke, don't break it."

IV. CONCLUSION

Thus, Saga respectfully submits that in the case of television licensees, LMA arrangements are contrary to the public interest. Such LMA arrangements should, in the future, be prohibited and existing LMA arrangements, particularly in duopoly situations, should be given no more than six months to terminate[19]. All existing LMA arrangements should be filed within thirty days because without such public scrutiny the FCC has no way to determine if, in fact, the arrangement is a sham and the licensee has abdicated control.

Additionally, no changes should be made to Section 73.3555 of the Rules as it governs the attribution of interests in licensees controlled by single majority stockholders.

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18 *Attribution of Ownership Interests*, 97 FCC 2d 997, 1008-1009 (1984).

19 In *Regents* the Supreme Court found that where the FCC was faced with a leased station in violation of the *Act*, the FCC had only two choices. Either order immediate termination of the lease arrangement or deny renewal of the license for violation of Section 310 of the *Act*.

Respectfully submitted,

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ATTACHMENT

The world of LMAs

The stations listed in boldface type operate the stations that immediately follow under local marketing agreements. In the top 100 markets, BROADCASTING & CABLE found 40 LMAs in 35 markets.

Market	DMA	Station	Affil.	Ownership
Dallas-Ft. Worth	8	**KDFW**	CBS	New World
		KDFI	Ind.	Dallas Media Investors
		KXAS	NBC	LIN
		KXTX	Ind./WB	KXTX Inc.
[redacted]				
Cleveland	13	**WOIO**	CBS	Malrite
		WUAB	Ind./UPN	Cannell
[redacted]				
Phoenix	19	**KTVK**	Ind./WB	Media America Corp.
		KASW	WB	Brooks Broadcasting
[redacted]				
Orlando-Daytona Beach	22	**WFTV**	ABC	Cox
		WZWY	Ind.	Reese Assoc. Ltd.
[redacted]				
Hartford-New Haven	26	**WVIT**	NBC	Viacom
		WTXX	Ind./WB	Counterpoint Comm.
		WTNH	ABC	LIN
		WTVU	Ind./WB	K-W TV
[redacted]				
Milwaukee	29	**WCGV**	Ind./UPN	Sinclair
		WVTV	Ind.	Gaylord B'csting
[redacted]				
Columbus	34	**WCMH**	NBC	Outlet Comm.
		WWHO	Ind./WB	Fant B'csting
[redacted]				
Grand Rapids	38	**WOOD**	NBC	LIN
		WOTV	ABC	LCH Comm.
[redacted]				
*New Orleans	41	**WGNO**	WB	Tribune Broadcasting
		WNOL	Fox	Qwest
[redacted]				
Harrisburg	44	**WHP-TV**	CBS	Clear Channel
		WLYH	UPN	Gateway Communications
West Palm Beach	[redacted]			Paxson B'csting
				Krypton B'csting
Providence	46	**WPRI**	CBS	Clear Channel
		WNAC	Fox	
Greensboro-High Point-Winston Salem	[redacted]			Act III B'csting
				Guilford B'csting Corp.
Albuquerque	49	**KRQE**	CBS	Lee Enterprises
		KASY	Ind.	Ramar Communications
Louisville	[redacted]			Blade Comm.
				Kentuckiana B'csting
Jacksonville	55	**WAWS**	Fox	Clear Channel
		WTEV	Ind./UPN	Krypton B'csting
Fresno-Visalia	[redacted]			Pappas
				Gray Coopla
Little Rock-Pine Bluff	58	**KLRT**	Fox	Clear Channel
		KASN	Ind./UPN	Mercury B'csting
Tulsa	[redacted]			Clear Channel
				RDS B'csting
Mobile-Pensacola	61	**WPMI**	Fox	Clear Channel
		WJTC	Ind./UPN	Mercury B'csting
Austin	65	**KTBC**	Fox	Argyle Television Holdings
		KXAN	NBC	LIN
		KNVA	Ind./WB	54 B'csting
Honolulu	69	**KHNL**	Fox	Providence Journal
		KFVE	Ind./UPN	KFVE Joint Venture
Green Bay-Appleton	70	**WGBA**	Fox	Donald Clark
		WXGZ	Ind./UPN	Ace TV
Omaha	74	**KPTM**	Fox	Pappas Telecasting
		KXVO	Ind.	Cocola Broadcasting Co.
Tucson	80	**KMSB**	Fox	Providence Journal
		KTTU	Ind./UPN	Clear Channel
Fort Myers-Naples	89	**WBBH**	NBC	Waterman B'cast Group
		WEVU	ABC	Ellis Comm.
Johnstown-Altoona	91	**WATM**	ABC	Smith B'csting Group
		WWCP	Fox	Evergreen B'cst Group

*Tribune owns approximately 33% of Qwest, but does not have an LMA with these stations.
Note: The smaller makrkets with LMAs include Lincoln-Hastings, Neb.; Florence-Myrtle Beach, S.C.; Columbus-Tupelo, Miss.; Duluth-Superior, Wis.; Victoria, Tex.; Greenville, N.C.; Monterey-Salinas, Calif; Eugene, Ore., and Billings, Mont.